Supreme Court, U.S.
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Supreme Court of the United States

RALPH T. BYRD, PETITIONER

v.

WOLPOFF & ABRAMSON, L.L.P., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE MARYLAND COURT OF SPECIAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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pro se

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QUESTIONS PRESENTED

1. Is it proper for creditors to manipulate bankruptcy proceedings to obtain advantage over debtors in unrelated state court litigation?

2. Do creditors' involuntary bankruptcy petitions against debtors divest the debtors of state common law causes of action for abuse of process to redress wrongdoing involving the creditors' subsequent misuse of the bankruptcy proceedings and, instead, limit debtors' remedies to those provided for under Federal Rule of Bankruptcy Procedure 9011?

PARTIES TO THE PROCEEDING

The Plaintiff/Appellant in the proceedings below, and the Petitioner before this Court, is Ralph T. Byrd, a solo practitioner attorney who, until January 31, 2007, practiced law out of his home at 4901 Sundown Road, Laytonsville, Maryland. The Defendants/Appellees below are the Respondents before this Court.

Defendant/Appellee Wolpoff & Abramson, L.L.P., was, at the time of the proceedings below, a law firm that operated and represented many different companies that purchased and collected credit card debt and other consumer debt. Harry K. Wolpoff, Esq. was the founding partner in the law firm of Wolpoff & Abramson, L.L.P. and the long time Chairman of the Peer Review Committee of the Attorney Grievance Commission of Maryland.

Defendants/Appellees Ronald M. Abramson, Esq., and Ronald S. Canter, Esq., were partners in the law firm of Wolpoff & Abramson, L.L.P.

Defendant/Appellee Peroutka & Peroutka, P.A. is a law firm that operates and represents many different companies that purchase and collect credit card debt and other consumer debt.

Defendant/Appellee Gary M. Janis, Esq. was a partner or associate in the law firm of Peroutka & Peroutka, P.A..

Defendants/Appellees Michele R. Gagnon, Esq., and Scott T. Whiteman, Esq. are partners or associates in Peroutka & Peroutka, P.A.

Defendant/Appellee Clifford A. Wilpon, Esq. is an attorney employed by Peroutka & Peroutka, P.A. on contract.

Defendant/Appellee Fletcher P. Thompson, Esq. is Assistant Bar Counsel for the Attorney Grievance Commission of Maryland.

Defendant/Appellee Dennis F. Biennas is an investigator with the Attorney Grievance Commission of Maryland.

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Maryland's Court of Appeals' Order denying certiorari is unpublished and is reproduced in the appendix to this petition at App. 1a.

Maryland's Court of Special Appeals' Order denying reconsideration of its affirmance of the Circuit Court for Montgomery County Maryland's dismissal of Petitioner's complaint for abuse of process is unpublished and is reproduced in the appendix to this petition at App. 2a.

Maryland's Court of Special Appeals' Opinion affirming the Circuit Court for Montgomery County Maryland's dismissal of Petitioner's complaint for abuse of process is unpublished and is reproduced in the appendix to this petition at App. 3a.

The Circuit Court for Montgomery County Maryland issued an oral opinion dismissing Petitioner's complaint for abuse of process. A transcript of the pertinent oral rulings from the bench is reproduced in the appendix to this petition at App. 34a.

JURISDICTION

Maryland's Court of Special Appeals issued its decision affirming the Circuit Court for Montgomery County Maryland's dismissal of Petitioner's complaint for abuse of process on August 7, 2009 and denied Petitioner's timely request for reconsideration on October 28, 2009. Maryland's Court of Appeals denied certiorari on December 18, 2009. Petitioner timely requested and received from this Court an extension of

time to file this Petition for Certiorari until May 17, 2010. This Court has jurisdiction under 28 U.S.C.A. 1257(a).

RELEVANT PROVISIONS INVOLVED

Federal Rule of Bankruptcy Procedure 9011 provides:

> **Rule 9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers**
>
> (a) Signing of papers
>
> Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.
>
> (b) Representations to the court
>
> By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge,

information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How initiated

(A) By motion

A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On court's initiative

On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of sanction; limitations

A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order

When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

STATEMENT

Petitioner was a solo practitioner attorney and co-owner of a property consisting of a four bedroom house and almost eleven wooden fenced acres which includes a large pond with a small island in it. Petitioner and his wife, Beverly Byrd had owned the property since 1993 and raised three sons there. Petitioner practiced law out his home and his wife operated several art related businesses before becoming a Baltimore City schoolteacher in 2005. In 1998, when their oldest son began to attend Yale University, Petitioner and his spouse began to fall behind in their credit card payments and began to incur more credit card debt.

In 2001 Platinum Financial Services Corporation, (hereinafter "Platinum") of which Respondent Harry Wolpoff, Esq. was president and Respondent Ronald Abramson, Esq., secretary, represented by Respondent Ronald Abramson, Esq., as counsel, obtained judgments against Petitioner in the District Court of Maryland for Montgomery County in the sum of approximately $32,000.00. Petitioner appealed the judgments to the Circuit Court for Montgomery County, Maryland on the grounds that the District Court of Maryland for Montgomery County committed error by ignoring or rejecting several legal defenses to Platinum's claims. App. 5a

While the judgments were still on appeal in the Circuit Court for Montgomery County, Maryland, and without making any effort whatsoever to collect their debt through the conventional methods available under state law, Respondents Harry Wolpoff, Esq., Ronald

Abramson, Esq., and Ronald Canter, Esq. met and decided to hire outside counsel to commence an involuntary bankruptcy proceeding against Petitioner in U.S. Bankruptcy Court for the District of Maryland. App. 5a

Said Respondents knew that once the involuntary bankruptcy proceeding was allowed to go forward in U.S. Bankruptcy Court Petitioner Ralph Byrd would be required to pay expenses incurred by the very creditor that placed Petitioner in involuntary bankruptcy as well as the expenses of the Bankruptcy Court trustee and his counsel.

In July, 2002 the Bankruptcy Court upheld the involuntary bankruptcy petition over Ralph Byrd's objections, and appointed a Chapter 7 Trustee to liquidate Petitioner Byrd's home and place of business. However, Petitioner appealed the Bankruptcy Court's ruling to the U.S. District Court for the District of Maryland on the grounds that the involuntary bankruptcy petition was filed in bad faith; a bona fide dispute over the debt precluded an involuntary bankruptcy proceeding; and the bankruptcy court should abstain from exercising its jurisdiction. App. 6a

In January, 2003 the U.S. District Court reversed the Bankruptcy Court's ruling, after considering and deciding only that a bona fide dispute over the debt precluded an involuntary bankruptcy petition based thereon. In response, the Chapter 7 bankruptcy trustee and Platinum, represented by Respondent Ronald Canter, Esq., appealed to the U.S. Court of Appeals for the Fourth Circuit. Petitioner sought to affirm the U.S. District Court's ruling,

arguing, once again, that a bona fide dispute over the debt precluded an involuntary bankruptcy proceeding; the involuntary bankruptcy petition was filed in bad faith; and the bankruptcy court should abstain from exercising its jurisdiction. See Brief of the Appellee, 2003 WL 25491255 in *In Re: Byrd* 357 F.3d 433 (4th Cir. 2004).

In February 2004 the Fourth Circuit Court of Appeals issued a published opinion in *In re: Byrd* which found no bona fide dispute over the alleged debt and reversed the U.S. District Court. However *In re: Byrd* never addressed Petitioner's extensive arguments for dismissal of the petition due to bad faith filing. Instead, *In re Byrd* stated, inexplicably, "Byrd admits that, if Platinum was eligible to file its petition, the bankruptcy court was justified in ordering relief against him. We therefore must decide only whether Platinum's claims are the subject of a bona fide dispute." *Id.* at 436. Furthermore, in refusing to address the issue of bad faith filing of the involuntary petition the Fourth Circuit made the fateful comment that "[t]he Bankruptcy Code does not require that a debtor's assets be dissipated while frivolous or hopeless appeals wend their way through the courts ... ." *Id.* at 441.

This language in *In re: Byrd* severely prejudiced all Petitioner's subsequent attempts to have the Bankruptcy Court or the U.S. District Court even entertain, much less grant, any relief the Petitioner requested. For example, immediately after the Fourth Circuit decided *In re: Byrd* and remanded the case for further proceedings consistent with the decision, Petitioner sought to have the U.S. District Court for the District of Maryland review the unreviewed issue

of bad faith filing of the involuntary petition. The Honorable William N. Nickerson noted Petitioner had "included extensive argument on bad faith and abstention as alternative grounds for affirming this court's decision. The Fourth Circuit, however, made no explicit mention of either of these arguments in its decision." App. 43a. Judge Nickerson ruled that "[g]iven the rationale and tenor of the Fourth Circuit's decision, this Court is doubtful that it has the authority to consider these issues." App. 43a. Significantly, Judge Nickerson four times quoted the Fourth Circuit's language about the Bankruptcy Code not requiring "that a debtor's assets be dissipated while frivolous or hopeless appeals wend their way through the courts, ..." App 42a, 45a, 46a, 47a. When Petitioner attempted to appeal Judge Nickerson's refusal to address the issue of bad faith, the Fourth Circuit Court of Appeals issued a one sentence dismissal of the appeal in Case No. 04-1961.

Faced with having to remain in bankruptcy, Petitioner exercised his statutory prerogative to convert his case from a liquidation proceeding under Chapter 7 of the Bankruptcy Code to a reorganization proceeding under Chapter 11 of the Bankruptcy Code wherein Petitioner's home and place of business would not be liquidated to pay his debts as long as he adhered to his Chapter 11 reorganization and repayment plan. App. 6a. However Platinum - represented by Respondent Ronald Canter, Esq. opposed Petitioner's efforts to keep his home and demanded that the Bankruptcy Court convert Petitioner's case back to a Chapter 7 liquidation. App. 7a

In July 2004 the Bankruptcy Court, instead of converting Ralph Byrd's case back to Chapter 7, appointed a Chapter 11 Trustee, over Petitioner's objections, to take charge of the liquidation of the Petitioner's home and place of business. Once a Chapter 11 Trustee was appointed to take charge of the liquidation of the Petitioner's home and place of business the only way Petitioner and his spouse, Beverly Byrd, could keep their home was for Mrs. Byrd to file for bankruptcy and develop a repayment plan under Chapter 13 of the Bankruptcy Code.) App. 7a

However, in November 2004, upon the filing of Beverly Byrd's Chapter 13 bankruptcy petition, Respondents Ronald Canter, Esq and Wolpoff & Abramson, L.L.P. immediately objected to her Chapter 13 Plan and demanded that Beverly Byrd's Chapter 13 repayment plan be converted to a Chapter 7 liquidation. Said Respondents then used their enormous corporate and legal resources to mount an overwhelming campaign against any approval by the Bankruptcy Court of Beverly Byrd's Chapter 13 repayment plan. App. 7a

Respondents Ronald Canter, Esq. and Wolpoff & Abramson, L.L.P. pursued said campaign against approval by the Bankruptcy Court of any repayment plan knowing that said campaign would result in additional administrative expenses and leave nothing for any other creditors since Petitioner's and his spouse's assets were insufficient to pay anything more than said administrative expenses after paying off the mortgage on their home.

It was never the intention of the Respondents to collect any credit card debts from Plaintiff. Rather the Respondents conspired to generate administrative fees in the bankruptcy court in the amount of more than $300,000.00 that would so encumber any repayment plan by Petitioner and his spouse that any repayment plan would be unfeasible because their income would be insufficient to accommodate a repayment plan that included payment of said administrative expenses. App 8a

Petitioner and his spouse had paid approximately $53,000.00 and never missed a payment under their Chapter 13 payment plan. Nevertheless, in January 2006 the Bankruptcy Court succumbed to the Respondents' overwhelming campaign to prevent Petitioner and his spouse from repaying their creditors pursuant to such plan and denied confirmation of the Petitioner's repayment plan. In March, 2006 the Bankruptcy Court converted Petitioner's repayment plan to a plan under Chapter 7 for the liquidation of Petitioner's home and place of business. App. 8a-9a.

Meanwhile Petitioner was representing defendants in hundreds of other Maryland state court credit card collection cases brought by companies owned, operated and/or represented by the Respondents. In those cases Petitioner raised, on behalf of his clients, the very same defenses that were in dispute with Platinum in Petitioner's own cases. At the time, no case law in the State of Maryland had addressed these legal defenses.

In October 2006 Respondent Gary Janis, Esq. filed a continuing complaint against Petitioner with the

Attorney Grievance Commission of Maryland alleging Petitioner had committed various violations of the Maryland Rules of Professional Conduct thereby causing the Attorney Grievance Commission of Maryland to conduct an investigation of Petitioner.

In fact, however, Petitioner had never met Gary Janis, Esq. nor appeared against him in court. Respondent Janis's false allegations against Petitioner were based on false information provided to him by Michelle Gagnon, Esq., Scott Whiteman, Esq., and Clifford Wilpon, Esq., against whom Petitioner had appeared scores of times as counsel for consumers who had been sued in Maryland state court credit card collection cases brought by companies owned, operated and/or represented by the Respondents.

Said complaint with the Attorney Grievance Commission of Maryland was filed with the purpose, common among all the Respondents, of disrupting and crippling Petitioner's law practice in an effort to destroy his ability to represent clients in credit card collection cases brought by companies owned, operated and/or represented by the Respondents. In the twenty eight years that he had practiced law, Petitioner had never been the subject of any investigation.

In an ongoing campaign to disrupt Petitioner's law practice and cripple his ability to represent his clients, Respondent Gary Janis, Esq. continued to file additional false charges against Plaintiff with the Attorney Grievance Commission of Maryland (wherein Respondent Harry Wolpoff, Esq. was the long standing Chairman of the Peer Review Committee) based on false information supplied by Respondents Michelle

Gagnon, Esq., Scott Whiteman, Esq., and Clifford Wilpon, Esq..

On December 1, 2006 the Respondents caused the Bankruptcy Court to issue an order, even prior to the Petitioner's property being sold, authorizing the Respondents, through the Chapter 7 trustee, with the assistance of United States Marshals, to remove the Petitioner and his family from their home on January 31, 2007 and destroy any remaining personal property of the Petitioner. App. 9a -10a.

Meanwhile as a result of the inconsistencies in the various state court rulings on the issues raised by Petitioner in his representation of defendants sued by debt collection companies owned or operated or represented by the Respondents, Maryland's Court of Appeals determined on December 14, 2006 that it was "desirable and in the public interest" to accept certiorari in the case of *Sheri Jackson v. Pasadena Receivables*, No. 106 September Term 2006 (decided at 398 Md 611 (2007)). Pasadena Receivables was represented by Respondent Michele Gagnon, Esq.. Sheri Jackson was represented by Petitioner. Sheri Jackson' brief was due on January 15, 2007; her reply brief due on February 26, 2007; and oral argument scheduled for March 8, 2007. App 9a- 10a.

Because of this, Petitioner asked the Bankruptcy Court to extend the time for Petitioner to remove his family and their property from their home and place of 11 business. However the Bankruptcy Court refused the request after the Respondents strenuously objected to any such extension of time.

On January 4, 2007 Respondents Harry Wolpoff, Esq. and Ronald S. Canter, Esq., noticed their appearances in Maryland's Court of Appeals on behalf of Pasadena Receivables, Inc. in *Sheri Jackson v. Pasadena Receivables* along with Michele Gagnon, Esq. of Peroutka & Peroutka, P.A.. App. 9a -10a.

Despite Petitioner's best efforts to remove himself, his family, and all their personal property from their home and place of business by January 31, 2007 they were still in the process of doing so when on February 6, 2007 Respondents' agents and U.S. Marshals came to the Petitioner's home and place of business while Petitioner and his family were still removing their property and began throwing it into dumpsters. Said property included personal property belonging to Petitioner and each of his family members, including furniture and other household furnishings and supplies, clothing, books, priceless mementos, documents, art work and supplies, photographs, farm equipment and children's toys. The amount of personal property that was destroyed filled more than eight huge dumpsters and was worth more than twenty-five thousand dollars but included many items which were invaluable to Petitioner and his family. App. 9a -10a.

The Respondents acted not in furtherance of any goal of collecting legitimate debts but with the common purpose of inflicting devastating financial harm and deprivation upon the Petitioner with the purpose of disrupting and crippling Petitioner's law practice in an effort to destroy his ability to represent clients in credit card collection cases brought by companies owned, operated and/or represented by the Respondents and to subject Petitioner's law practice to catastrophic

disruption just prior to oral argument in the Court of Appeals in *Jackson v. Pasadena Receivables*. App. 10a - 11a.

On March 6, 2007 Petitioner was in the Circuit Court for Howard County, Maryland awaiting oral argument in an appeal of a judgment against a defendant represented by Petitioner. Without any prior notice of a subpoena or communication of any kind regarding the need there for, and minutes before the case was called for oral argument, Respondent Dennis Biennas, in the presence of Respondent Scott Whiteman, Esq., served Petitioner with a subpoena issued by Respondent Fletcher Thompson, Esq.. The subpoena demanded Petitioner's files in seventeen credit card collection cases brought by debt collection companies owned, operated and/or represented by the Respondents and where Petitioner represented the defendants. The subpoena also demanded "all documents connected with" the more than five years of the aforementioned bankruptcy litigation. In addition, the subpoena demanded that Petitioner produce all of said materials within three days, by March 9, 2007, despite the fact that Respondents Fletcher Thompson, Esq. and Dennis Biennas knew Petitioner would be participating in oral argument in the Court of Appeals on March 8, 2007 on behalf of Sheri Jackson in *Sheri Jackson v. Pasadena Receivables* wherein Respondents Harry Wolpoff, Esq. and Ronald Canter, Esq. noticed their appearances in Maryland's Court of Appeals on behalf of Pasadena Receivables, Inc. along with Respondent Michele Gagnon, Esq. of Peroutka & Peroutka, P.A.. App. 27a - 28a.

There was absolutely no need or justification for the service of the subpoena upon Petitioner at that time, minutes before oral argument. Nor was there any need or justification for the subpoena to have required Petitioner to appear at a deposition and produce "all documents connected with" the more than five years of the aforementioned bankruptcy litigation within three days of service of the subpoena.

Petitioner never complied with said subpoena and no effort was made by Respondents Fletcher Thompson, Esq. or Dennis Biennas to enforce said subpoena at that time or at any other time. The subpoena was served with no expectation whatsoever that Petitioner would be able to comply. Rather the subpoena was issued for no other purpose than to distract Petitioner from the oral argument in the Circuit Court for Howard County, Maryland which commenced within minutes after Dennis Biennas served Petitioner with the subpoena and also to distract Petitioner from the oral argument that was to take place in *Sheri Jackson v. Pasadena Receivables* on March 8, 2007 wherein Respondents Harry Wolpoff, Esq. and Ronald Canter, Esq. noticed their appearances in Maryland's Court of Appeals on behalf of Pasadena Receivables, Inc. along with Respondent Michele Gagnon, Esq.. App. 27a -28a.

On May 23, 2007 Petitioner received correspondence from the Attorney Grievance Commission of Maryland advising him that an additional complaint had been docketed by Bar Counsel based upon correspondence and telephone communications with and voluminous documents obtained from the trustee and his counsel, both acting

as Respondents' agents in Petitioner's bankruptcy proceeding. Said correspondence and telephone communications and voluminous documents obtained from the bankruptcy trustee and his counsel presented a false and/or distorted history of Petitioner's bankruptcy and mischaracterized Petitioner's actions therein. Said agents of Respondents used the authority given them by the Bankruptcy Court and information obtained therein to attempt to destroy Petitioner's ability to practice law by removing him from his place of business and attempting to cause him to be disbarred in order to inflict devastating financial harm and deprivation upon Petitioner and to disrupt and cripple his law practice in an effort to destroy Petitioner's ability to represent clients in credit card collection cases brought by companies owned, operated and/or represented by the Respondents and to subject Petitioner's law practice to catastrophic disruption just prior to oral argument in Maryland's highest state court.

On June 26, 2007 the Attorney Grievance Commission's Peer Review Committee convened a hearing on the charges brought against Petitioner by Respondent Peroutka & Peroutka, P.A. and recommended that the charges be dismissed with a warning.

Nevertheless, Respondents Harry Wolpoff, Esq. and Fletcher Thompson, Esq. caused the Attorney Grievance Commission to issue a letter to Petitioner dated July 23, 2007, advising him that the Attorney Grievance Commission had disapproved the recommendation of its own Peer Review Committee

and would be filing additional charges against Petitioner.

On October 16, 2007 Petitioner filed the amended civil complaint against the Respondents for abuse of process and civil conspiracy which is the subject of this Petition. On May 20, 2008 the Circuit Court for Montgomery County, Maryland held a hearing and granted the Respondents' Motion(s) To Dismiss on the grounds that the claims against the Respondents were either preempted by provisions of the Bankruptcy Code or barred because some of the Respondents' actions were privileged or because some the Respondents were immune from suit. App34a - 37a.

On June 19, 2008 Petitioner filed a timely Notice of Appeal, as of right, to Maryland's intermediate appellate court, the Court of Special Appeals, which affirmed the judgment of the Circuit Court for Montgomery County, Maryland on August 7, 2009 App. 3a, and denied reconsideration on October 28, 2009, App. 2a. Petitioner filed a timely petition for certiorari in Maryland's court of last resort, the Court of Appeals, which denied certiorari on December 18, 2009, 1a..

Petitioner timely sought and obtained from the United States Supreme Court an extension of time to file this Petition for Certiorari until May 17, 2010.

REASONS FOR GRANTING THE PETITION

This case squarely presents two especially important questions of federal law, in today's economy, which Maryland's intermediate appellate court has decided erroneously, in Petitioner's view, and for which

Maryland's court of last resort has denied certiorari. Quite simply the questions are whether it is proper for a creditor to manipulate a bankruptcy proceeding to gain advantage over a debtor in unrelated state court litigation, and whether the remedies for any such misuse of bankruptcy proceedings are limited to those provided for under Federal Rule of Bankruptcy Procedure 9011. While numerous courts have considered these questions neither question has been settled by the United States Supreme Court and Maryland's court of last resort has decided the second question in a way that conflicts with the reported decision of at least one other state court of last resort.

The questions are important because prior to *In re: Byrd*, 357 F.3d 433 (4th Cir. 2004) the last reported Fourth Circuit Court of Appeals opinion involving the proper purpose of an involuntary bankruptcy petition was *Atlas Machine & Iron Works v. Bethlehem Steel* 986 F. 2d 709 (4th Cir. 1993). In affirming the lower courts' dismissal of the involuntary petition in *Atlas*, the Fourth Circuit noted that the petitioners therein had filed the involuntary petition in order to collect a debt. The *Atlas* opinion held that the involuntary petition had been filed in bad faith because, *inter alia*, "[d]ebt collection is not a proper purpose of bankruptcy." *Id.* at 716.

By contrast, *In re: Byrd* represented a significant, yet unexplained, departure from that principle. *In re: Byrd* accepted the bankruptcy court's view that "the filing of an involuntary petition is but one of many means by which a creditor like Platinum can seek collection of its judgments." *Id.* at 437. In addition, the Fourth Circuit failed to address or even

mention the extensive arguments for dismissal of the petition due to bad faith filing set forth in Byrd's brief, instead stating, inexplicably, "Byrd admits that, if Platinum was eligible to file its petition, the bankruptcy court was justified in ordering relief against him. We therefore must decide only whether Platinum's claims are the subject of a bona fide dispute." *Id.* at 436. As explained above, *In re: Byrd* prejudiced all Petitioner's efforts thereafter in the Bankruptcy Court to protect his interests and apparently supports the conclusion, in the Fourth Circuit, at least, that creditors may now force debtors into involuntary bankruptcy as a means of debt collection notwithstanding unresolved issues regarding the propriety of the creditors' underlying objectives and motives. The question before the U.S. Supreme Court is what, if any, remedies are available to debtors who have been harmed by a creditor's abuse of the bankruptcy proceeding once it has been allowed to go forward.

The United State Supreme Court should take this opportunity to make clear it is improper for a creditor to place a debtor in involuntary bankruptcy and then deliberately manipulate the proceedings to obtain advantage over the debtor in unrelated state court litigation. The U.S. Supreme Court should also make clear that debtors are not divested of their state common law causes of action for abuse of process and are not limited to the remedies provided for under Federal Rule of Bankruptcy Procedure 9011 to redress abuse of process involving the creditors' misuse of the bankruptcy proceedings.

I. THE UNITED STATES SUPREME COURT SHOULD SETTLE WHETHER IT IS PROPER FOR A CREDITOR TO PLACE A DEBTOR IN INVOLUNTARY BANKRUPTCY AND THEN DELIBERATELY MANIPULATE THE PROCEEDINGS TO OBTAIN ADVANTAGE OVER THE DEBTOR IN UNRELATED STATE COURT LITIGATION.

A. *The Lower Court's Opinion Is In Conflict With Those Of Other Courts.*

In the August 7, 2009 Opinion of the Court of Special Appeals (hereinafter "the Opinion"), App. 15a, it concludes that Petitioner "does not allege facts sufficient to show a perversion of court process to accomplish some end which the process was not designed to accomplish as opposed to the regular use of process even with ulterior motives. ... After all, the purpose of the order issued by the Bankruptcy Court in December 2006 was to evict appellant and his family from the premises, which is exactly what was accomplished."

This passage from the Opinion included the following footnote 3 (App. 30a):

> When the attorney for the trustee and the Federal Marshall evicted appellant in February 2007, appellant's house had already been sold by the trustee pursuant to an order by the Bankruptcy Court. The docket entries of the Bankruptcy Court show that the sale was made in May of 2006. Appellant failed to obey the court's order to remove himself and his

> possessions from the house by January 31, 2007. Therefore, the obvious reason why the property was seized in February 2007, was so that the person who purchased the property could take possession of it.

The Opinion is mistaken in its conclusion that Petitioner does not allege facts sufficient to show a perversion of court process to accomplish some end which the process was not designed to accomplish as opposed to the regular use of process even with ulterior motives for several reasons.

First, the U.S. Supreme Court may take judicial notice that the docket entries in bankruptcy case 04-35620 in the U.S. Bankruptcy Court for the District of Maryland show that the Bankruptcy Court did not even issue its Order permitting the sale of Petitioner's home and place of business until April 25, 2007, more than two and a half months after Petitioner's eviction. (The closing on the sale did not occur until May 25, 2007.) Furthermore, in reaching the conclusion that Petitioner does not allege facts sufficient to show a perversion of court process to accomplish some end which the process was not designed to accomplish as opposed to the regular use of process even with ulterior motives Maryland's Court of Special Appeals went beyond the issues ruled on by the trial court, which never reached the sufficiency of the allegations of Petitioner's abuse of process claim. Rather, the trial court dismissed Petitioner's claims based upon the trial court's determination that those claims are preempted by provisions of the Bankruptcy Code or because some of the Respondents were privileged or immune from suit. App. 35a -37a.

Second, in stating "after all, the purpose of the order issued by the Bankruptcy Court in December 2006 was to evict appellant and his family from the premises, which is exactly what was accomplished" the Opinion fails to distinguish the purpose of the Bankruptcy Court order from the improper purpose element of Petitioner's abuse of process claim against the Respondents. As the Opinion recognizes, Petitioner's Third Amended Complaint alleges the Respondents' improper purpose was "to seize [p]laintiff's home and place of business and [to] inflict devastating financial harm and deprivation upon [p]laintiff and to subject [p]laintiff's law practice to catastrophic disruption in an effort to destroy [p]laintiff's ability to represent clients in credit card collection cases brought by companies owned, operated and/or represented by Wolpoff & Abramson, Harry Wolpoff, Ronald Abramson and Ronald Canter (among others)" and "to subject [p]laintiff's law practice to catastrophic disruption just prior to oral argument in the Court of Appeals in *Sheri Jackson v. Pasadena Receivables*" (emphasis added.) App. 14a, 27a.

It is well established that filing an involuntary petition to manipulate state court litigation is an improper purpose." Filing a petition to gain a strategic advantage, rather than to protect one's interest relative to other creditors or to prevent dissipation of assets, constitutes an improper purpose." *In re Cannon Express Corp.*, 280 B.R. 450, 456 (Bkrtcy W.D. Ark 2002); *In re Silverman* 230 B.R. 46, 53 (Bkrtcy D.N.J. 1998). "Unscrupulous creditors should not be allowed to change the outcome of an existing lawsuit by filing for refuge in bankruptcy courts." *In re: Manhattan*

Industries, Inc. 224 B.R. 195, 201 (Bkrtcy. M.D. Fla. 1997).

> [B]eing targeted by an involuntary bankruptcy petition is a disruptive and, in many cases, financially traumatic event for the alleged debtor. Resources, including time and money, must be diverted from other commitments to defend against the petition. Moreover, pending a resolution of the issues by the bankruptcy court, the alleged debtor exists in a financial interstice, necessarily uncertain of its future, restricted in its ability to make normal business decisions and plans. The pendency of the bankruptcy petition may cause suppliers, customers and investors to be reluctant to deal with the debtor.
>
> And even if adjudication of bankruptcy relief proves unwarranted, and the petition is eventually dismissed, the debtor may suffer considerable loss or damages from the process.

In re: Macke Intern, Trade, Inc. 370 B.R. 236, 246 (9th Cir. BAP 2007). While Petitioner's abuse of process claim is not grounded in the bad faith filing of the involuntary petition, the above cited case law clearly compels the legal conclusion that the Respondents' conduct in pursuing subsequent proceedings in the Bankruptcy Court over a period of years as detailed in Petitioner's Third Amended Complaint was designed "to obtain a result not contemplated by law" *Krashes v. White*, 275 Md. 549, 555, 341 A.2d 798, 802 (1975) and "aimed at an objective not legitimate in the use of the process" as contemplated in *Palmer Ford, Inc., v. Wood*, 298 Md. 484, 511, 471 A.2d 297, 311 (1984). (Cited at App. 11a –12a.) The Respondents' purpose was to

force Petitioner to stop representing defendants in the Respondents' credit card collection cases. Such use of process, after it was issued, was "aimed at an objective not legitimate in the use of the process" *Palmer*, *supra*, at 511. *See also General Refractories Co. v. Fireman's Fund Ins. Co.* 337 F. 3d 297, 304-309 (3rd Cir. 2003) cited in Harper & James On Torts Sec. 4.9 at 549 (3rd ed. 2006) for the principle that the cause of action should be available in other circumstances as well, so long as intentional abuse of the legal system can be proved.

Therefore, while the purpose of one of the Bankruptcy Court orders was to evict Petitioner and his family from the premises, such purpose (and accomplishment) constituted only one of the improper objectives specified in Petitioner's abuse of process cause of action. Thus even assuming the Bankruptcy Court order of eviction, in isolation, was legitimate, the Respondents' use of said order to help accomplish their illegitimate purposes was improper.

Last, the fact that the eviction occurred pursuant to a court order can not, by itself, negate an abuse of process cause of action, since no legal seizure of property, or arrest, can ever occur without a court order. If the fact of a valid court order could preclude a cause of action for abuse of process, such a cause of action could not exist. An absence of probable cause for the court order is not an element of the tort of abuse of process, *Thomas v. Gladstone*, 386 Md. 693, 874 A.2d 434 (2005). *Berman v. Karvounis*, 308 Md. 259, 518 A.2d 726 (1987).

For all these reasons Petitioner respectfully submits the United States Supreme Court should settle the important question of what constitutes an improper use of bankruptcy proceedings and rule Maryland's Court of Special Appeals was incorrect in its conclusion that Petitioner "does not allege facts sufficient to show a perversion of court process to accomplish some end which the process was not designed to accomplish."

II. THE UNITED STATES SUPREME COURT SHOULD SETTLE WHETHER THE INVOLUNTARY BANKRUPTCY PETITION DIVESTED PETITIONER OF HIS COMMON LAW CAUSE OF ACTION FOR ABUSE OF PROCESS AND LIMITED HIS REMEDIES TO THOSE PROVIDED FOR UNDER FRBP 9011.

A. *Cases Involving Alleged Improper Filings In Bankruptcy Filings In Bankruptcy Court Are Not Apposite*

All the cases cited in the Opinion's preemption analysis (App. 14a- 22a) involved allegations of improper filing of papers in Bankruptcy Court. The filings involved involuntary petitions, or disallowed claims, or papers seeking to affect a debtor's right to be discharged from bankruptcy

Glannon v. Garrett & Associates 261 B.R. 259 (D.Kans. 2001) involved a suit in federal court grounded in a state law claim for malicious prosecution after a finding of bad faith filing of an involuntary petition. The Opinion included an extensive quote (App. 15a - 18a) from *Glannon* which included the emphasized

statement that "an examination of the relevant case law leads the court to the conclusion that the Bankruptcy Code permits no State law remedies for abuse of the bankruptcy provisions." Petitioner would not gainsay this statement as it relates to *Glannon*, since there the plaintiff's cause of action was expressly based upon the defendants' alleged violations of 11 U.S.C. 303 and 362. Both of those provisions contain express remedies in the Bankruptcy Court forum for violations thereof. By contrast, the Petitioner's claims in his case are not based upon any violations of express Bankruptcy Code provisions and no express remedies for Petitioner's claims exist anywhere in the Bankruptcy Code. *MSR Exploration, Ltd., v. Meridian Oil, Inc.*, 74 F.3d 910 (9th Cir. 1996) involved a suit in state court for malicious prosecution after a creditor's claims filed in Bankruptcy Court were disallowed. *Gene R. Smith Corp. v. Terry's Tractor, Inc.*, 209 Cal. App.3d 951, 257 Cal. Rptr 598 (Cal. Ct. App. 1989) involved a suit for malicious prosecution based upon the alleged improper filing of an involuntary petition. *Koffman v. Osteoimplant Tech., Inc.* 182 B.R. 115 (1995) involved allegations of improper filing of an involuntary petition and violation of the automatic stay, both of which have express remedies under the Bankruptcy Code (11 U.S.C 303(i) and 362(h), respectively.) *Gonzales v. Parks*, 830 F.2d 1033 (9th Cir. 1987) involved an allegation of improper filing of a voluntary petition and violation of the automatic stay which has an express remedy under 11 U.S.C. 362(h). *Shiner v. Moriarty*, 706 A.2d 1228 (Pa. Super. Ct. 1998) involved allegations of improper filings of various improper bankruptcy papers. *Edmonds v. Lawrence Nat'l Bank* 823 P.2d 219 (Kan.Ct. App. 1991) involved allegations of improper filing of a complaint to revoke a debtor's discharge.

Idell v. Goodman 273 Cal. Rptr. 605 (Cal. App. 3d. 1990) involved allegations of improper filing of an adversary proceeding seeking to bar a debtor's discharge.

The fact that these cases were based upon allegations of filings that violated express provisions of the Bankruptcy Code is significant since the remedies for the alleged wrongful filings were either expressly available in applicable Bankruptcy Code provisions, *e.g.* 11 U.S.C. 303(i) and 362(h), or the plaintiff could have sought a remedy under B.R. Rule 9011. By contrast, as explained below, Petitioner's cause of action was not based upon any alleged improper filing and the remedies available to redress such improper filings were not available to the Petitioner herein to remedy the harms he had suffered through the Respondents' years of abuse of process.

In addition, the concern expressed in the Opinion that "[t]o allow state law claims, such as those set forth in Byrd's complaint, to go forward would discourage creditors from exercising their rights in the Bankruptcy Court" (App. 20a) might be far more valid as it applies to filings of petitions for relief in the Bankruptcy Court since such filings often occur under exigent circumstances. No such concern or protection should attach to the kind of continuous ill considered, but deliberate litigation campaign which sought, successfully, to evict appellant and his family from their home prior to even having a buyer and which has resulted in close to $400,000.00 in administrative claims caused by the Respondents and their agents' determination "to seize [p]laintiff's home and place of business and [to] inflict devastating financial harm and deprivation upon [p]laintiff and to subject [p]laintiff's

law practice to catastrophic disruption in an effort to destroy [p]laintiff's ability to represent clients in credit card collection cases brought by companies owned, operated and/or represented by Wolpoff & Abramson, Harry Wolpoff, Ronald Abramson and Ronald Canter (among others)" and "to subject [p]laintiff's law practice to catastrophic disruption just prior to oral argument in the Court of Appeals in *Sheri Jackson v. Pasadena Receivables*", all under the guise of collecting $32,000.00 in state court judgments (which were never collected due to the exorbitant administrative claims.) Perhaps creditors should be discouraged from such a course of conduct, especially when a debtor has shown good faith by making payments into a Chapter 13 plan of more than $53,000.00 and having never missed a payment thereunder.

B. *Federal Rule Of Bankruptcy Procedure 9011 Does Not Apply.*

The Opinion reaches the conclusion that "Byrd's argument might have merit if no Bankruptcy Rule allowed him to seek sanctions in the Bankruptcy Court after the defendants or their agents committed the tort of abuse of process. ... . But his argument overlooks Bankruptcy Rule 9011 (b) and (c) ... ." App. 20a.

However, the sanctions under Bankruptcy Rule 9011, by the express language of the Rule, apply only to "a petition, pleading, written motion, or other paper" that has been signed, filed, submitted or later advocated in the Bankruptcy Court "for any improper purpose." See Rule 9011(b). The sanctions under Rule 9011 were not meant to address a cause of action under Maryland law for abuse of process involving not only

the filing of papers in Bankruptcy Court but, rather, a course of conduct by the Respondents in Bankruptcy Court, the U.S. District Court, the U.S. Court of Appeals for the Fourth Circuit, and the Maryland Attorney Grievance Commission over a period of seven years that only culminated in a cause of action upon the seizure of the Petitioner's home. *See One Thousand Fleet Ltd. Partnership v. Guerriero,* 346 Md. 29 (1997).

In addition, Rule 9011(c)(1)(A) makes clear that the Rule contemplates the seeking of sanctions for an individual, discrete, petition, pleading, written motion, or other paper that might be susceptible to correction or withdrawal, since the Rule requires that the remedy of sanctions be sought by motion only after affording the alleged wrongdoer 21 days to correct or withdraw the wrongful paper prior to service of the motion for sanctions. Clearly, the 21 day "safe harbor" provision under Rule 9011(c)(1)(A) would be of no use after the seizure of Petitioner's house resulting from seven years of activity by the Respondents in Bankruptcy Court, the U.S. District Court, the U.S. Court of Appeals for the Fourth Circuit, and the Maryland Attorney Grievance Commission.

Furthermore, Rule 9011 applies only to a petition, pleading, written motion, or other paper that has been signed, filed, submitted or later advocated in the Bankruptcy Court as opposed to the U.S. District Court, the U.S. Court of Appeals for the Fourth Circuit or the Maryland Attorney Grievance Commission. Appeals from the Bankruptcy Court to the U. S. District Court and from the U.S. District Court to the U.S. Court of Appeals are governed by the Federal Rules of Appellate Procedure, which have no

counterpart to Rule 9011. While Rule 38 of the Federal Rules of Appellate Procedure permits the recovery of damages and costs for frivolous appeals it does not contain the broad applicability to papers filed for any "improper purpose" found in Rule 9011. *See In re Westin Capital Markets, Inc.*, 184 B.R. 109 (D. Oregon 1995); *In re George Schumann Tire & Battery Co.* 106 B.R. 296 (M.D. Fla. 1989). In footnote 2 of the Opinion (App. 30a) the Court of Special Appeals took judicial notice of the Bankruptcy Court docket entries. The docket entries also reflect the following appeals in addition to *In Re: Byrd* 357 F.3d 433 (4th Cir. 2004). In the U.S. District Court at the time of the Third Amended Complaint they were Cases Nos. 02-2675 WMN, 03-0600 PJM, 04-3312 JFM, 05-2389 AW, 06-00895 AW, 06-2704 AW, 07-328 AW, 07-1421 AW, 07-1730 AW, 07-2960 AW, 07-3039 AW. In the Fourth Circuit Court of Appeals they were Cases Nos. 04-1961, 06-2042, 07-1126, 07-1138, and 07-1336. None of the Respondents' activity in those appeals was subject to Rule 9011 sanctions.

Furthermore, the Opinion is in direct conflict with the opinion of the Texas Supreme Court in *Graber v. Fuqua*, 279 S.W. 3d 608 (2009). *Graber* involved a lawsuit by a debtor for malicious prosecution in state court based upon the defendant's alleged wrongful filing of an adversary proceeding against the debtor in the debtor's bankruptcy proceeding. The Texas Supreme Court, in a very comprehensive split decision, ruled that the debtor's state law claims were not preempted. *Graber* also examined the role of Rule 9011 and 11 U.S.C.A 105 among other statutes and held that Congress never intended that those statutes would preempt a debtor's right to seek redress with a common

law state cause of action. *Graber v. Fuqua*, *supra*, at 610 - 618.

Clearly when a creditor undertakes to commence an involuntary bankruptcy proceeding against a debtor and then deliberately manipulates and misuses those proceedings the debtor's remedies should not be curtailed by the creditor's choice of forum. It is error and contrary to principles of federalism, for courts to construe the Bankruptcy Code to preempt state common law causes of action for abuse of process that would otherwise apply if the abuse occurred in a non-bankruptcy proceeding.

CONCLUSION

For all the foregoing reasons the petition for a writ of certiorari to review the judgment of the Court of Special Appeals of Maryland and the denial of certiorari by Maryland's Court of Appeals should be granted.

Respectfully submitted,
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IN THE COURT OF APPEALS OF MARYLAND
Petition Docket NO. 446
September Term 2009

No. 0888 September Term 2008
Court of Special Appeals

RALPH T. BYRD V. WOLPOFF & ABRAMSON, L.L.P, et al.

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answers filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

s/Robert M .Bell
Chief Judge

Date: December 18, 2009

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 0888 September Term 2008

RALPH T. BYRD V. WOLPOFF & ABRAMSON, L.L.P., et al.

ORDER

Upon consideration of Appellant's Motion for Reconsideration of the Court's unreported opinion filed on August 7, 2009 and Appellant's Motion to Supplement Motion for Reconsideration, it is this 28th day of October, 2009, by the Court of Special Appeals,

ORDERED that Appellant's Motion for Reconsideration and Motion to Supplement Motion for Reconsideration are deneid.

For a Panel of the Court

Peter B. Krauser
Chief Judge

UNREPORTED
IN THE COURT OF SPECIAL APPEALS OF
MARYLAND
No. 0888 September Term 2008

RALPH T. BYRD V. WOLPOFF & ABRAMSON, L.L.P., et al.

Hollander, Salmon, Graeff, JJ.

Opinion by Salmon, J.

Filed: August 7, 2009

Ralph Byrd ("Byrd"), the appellant, has practiced law in Maryland since 1992. He frequently represents debtors and has often been on the opposite side of cases filed by two Montgomery County law firms that represent creditors. Those law firms are Wolpoff & Abramson, LLP and Peroutka & Peroutka, P.A.

Byrd filed a third amended complaint in the Circuit Court for Montgomery County on October 16, 2007, in which he named the aforementioned two law firms as defendants. Also named as defendants were several lawyers who either worked for or were partners in the two firms.

Byrd's complaint was based, in large part, on actions taken by the defendants during the course of a federal bankruptcy proceeding in which Byrd was the debtor. The defendants were alleged to have committed the tort of abuse of process in connection with actions they, or their agents, took in the bankruptcy proceeding; a

second count alleged that the defendants were all guilty of "conspiracy" with co-defendants and others.

In addition to the allegations of misdeeds committed in connection with the bankruptcy proceedings, Byrd sued Peroutka & Peroutka; P.A., as well as Gary M. Janis, Esquire, an associate in that firm, because Janis filed a grievance against Byrd with the Maryland Attorney Grievance Committee. The third amended complaint alleges that Janis filed the grievance based on false information he received from three lawyers who also worked for Peroutka & Peroutka, P.A., i.e., Michelle R. Gagnon, Esq., Scott T. Whiteman, Esq. and Clifford A. Wilpon, Esq.

Finally, the third amended complaint alleged that Assistant Bar Counsel, Fletcher P. Thompson, abused legal process and conspired with the other defendants when he served upon Byrd an investigative subpoena issued by the Maryland Attorney Grievance Commission "minutes before" Byrd was to present oral argument in an unrelated case he was litigating in the Circuit Court for Howard County. The complaint alleged that Thompson conspired with the other named defendants to "disrupt and cripple" Byrd's law practice by serving the subpoena on him. Also named in the complaint was Dennis F. Biennas, an investigator for the Attorney Grievance Commission. Biennas, like the other defendants, was alleged to have committed the tort of abuse of process but the only allegedly tortious act committed by Biennas that is mentioned in the complaint is: that he served the aforementioned investigative subpoena upon Byrd.

Motions to dismiss the complaint were filed by the defendants. The motions judge, after a hearing, dismissed the third amended complaint, with prejudice, against all defendants. Byrd asserts on appeal that the circuit court erred in dismissing his lawsuit.

I.

Allegations Against the Defendants Arising Out of Acts Committed During the Bankruptcy Court Proceeding.

In 2001, Platinum Service Corporation ("Platinum") obtained a judgment against Byrd in the District Court of Maryland for approximately $32,000.00. Platinum's president at the time was Harry Wolpoff and its secretary was Ronald Abramson ("Abramson").

The attorneys who represented Platinum in obtaining the judgment against Byrd were Messrs. Wolpoff and Abramson, who are partners in the law firm that bears their name.

Byrd appealed the judgment to the Montgomery County Circuit Court. The grounds for the appeal were based upon what the complaint refers to as "novel legal defenses." While the judgment was still on appeal, Ronald Canter, who is described in the complaint as "either a partner or associate" in the Wolpoff and Abramson law firm, met with Messrs. Wolpoff and Abramson and the threesome decided to hire "the Schulman Rodgers law firm" to file an involuntary bankruptcy petition against Byrd in the U.S. Bankruptcy Court for the District of Maryland.

The Schulman Rodgers law firm filed the involuntary petition and the petition was served by Abramson on Byrd while the latter was in court preparing to personally defend another collection lawsuit that Platinum had filed against him (Byrd). The filing of the bankruptcy petition caused the lawsuit filed by Platinum against Byrd to be stayed.

The involuntary bankruptcy petition asked the Bankruptcy Court to seize and liquidate Byrd's home and place of business, both of which were located at 4901 Sundown Road, Laytonsville, Maryland.

The Bankruptcy Court upheld the involuntary petition, over Byrd's objection, in July 2002 and appointed Rodger Schlossberg, Esquire, as the Chapter 7 trustee to liquidate Byrd's home and place of business. Byrd appealed the Bankruptcy Court's ruling to the U.S. District Court, which ruled in Byrd's favor. The reversal was appealed by Mr. Schlossberg and by Platinum. Ronald Canter represented Platinum on the appeal. The U. S. Court of Appeals for the Fourth Circuit reversed the decision of the United States District Court in February 2004. The effect of the reversal permitted the involuntary bankruptcy proceeding to continue against Byrd.

After the reversal, Byrd exercised his prerogative to convert his case from a liquidation proceeding under Chapter 7 of the Bankruptcy Code to a reorganization proceeding under Chapter 11. According to the complaint, a Chapter 11 proceeding was advantageous to Byrd because if Byrd's repayment plan was approved by the court, his home and place of business

would not be subject to forfeiture so long as Byrd made payments in conformity with the plan.

Platinum, represented by Canter, along with Roger Schlossberg as trustee, opposed Byrd's proposed reorganization. Scholossberg was represented by James Ho an, Esquire, who was a partner in the Schulman Rogers Law Firm when the opposition was filed. Byrd's opponents demanded that the Court convey t his case back to a Chapter 7 liquidation proceeding.

Schlossberg thereafter resigned as trustee and the Bankruptcy Court, in July 2004, appointed Gregory Johnson, Esquire as the Chapter 11 trustee "to take charge of the liquidation of plaintiff's home and place of business."

According to the third amended complaint, once Johnson was appointed as a Chapter 11 trustee, the only way Byrd could keep his home was to have his wife, Beverly Byrd, file for bankruptcy under Chapter 13 of the Bankruptcy Code; such a filing would achieve an automatic stay of any effort to liquidate Byrd's home while the debtor put together a repayment plan under Chapter 13.

Beverly Byrd filed a Chapter 13 bankruptcy petition, but Gregory Johnson, the new trustee, Ronald Canter and Wolpoff and Abramson "immediately objected to her Chapter 13 Plan and demanded that. . . [the] repayment plan be converted to a Chapter 7 liquidation of [Byrd's] home and place of business." The "[d]efendants" then proceeded to use "their enormous corporate and legal resources to mount an overwhelming campaign against any approval by the

Bankruptcy Court of Ralph and Beverly Byrd's repayment plan." The campaign against the Byrds was pursued by "the defendants" even though they knew that "said campaign would result in additional administrative expenses for the benefit of Gregory Johnson, James Hoffman and the Schulman Rogers firm and would leave nothing for any "other creditors [because] Ralph and Beverly Byrd's assets were insufficient to pay anything more than administrative expenses after paying off the mortgage on their home."

The third amended complaint alleges that it was never the intention of either "Wolpoff and Abramson or Peroutka & Peroutka, or any member of those law firms [who were] named as defendants, to collect any credit card debts" from Byrd; instead, all the defendants just named conspired with the first trustee, Roger Schlossberg, and the second trustee, Gregory Johnson, James Hoffman and Schulman Rodgers "to run up administrative fees in the Bankruptcy Court in the amount of more than $300,000.00." The goal of the conspiracy was to make the administrative expenses so high that it would "encumber any repayment plan by Ralph Byrd and Beverly Byrd," making the repayment impossible because the income of Ralph and Beverly Byrd would be "insufficient to accommodate a repayment plan that included payments of said administrative expenses."[1]

The third amended complaint also alleges that although "Ralph and Beverly Byrd had paid approximately $53,000, pursuant to the Chapter 13 reorganization plan and despite the fact that [the Byrds] had never missed a payment under that plan, in January 2006 the Bankruptcy Court succumbed to the [defendants'

overwhelming campaign" and denied confirmation of the repayment plan proposed by the Byrds.

The Bankruptcy Court, in March 2006, converted the Byrd's repayment plan to a plan under Chapter 7 that allowed for the liquidation of the home and place of business owned by the Byrds.

Gregory Johnson, the bankruptcy trustee, and his counsel, James Hoffman, and Schulman and Rodgers caused the Bankruptcy Court to issue, on December 1, 2006, "an order authorizing the trustee and his counsel, with the assistance of the United States Marshall, to remove Byrd and his family from his home." The eviction was to occur on January 31, 2007. According to the third-party complaint, the trustee and his attorney with the assistance of the United States Marshall was authorized to "destroy all of [the Byrds'] remaining personal property."

The December 1, 2006 order was issued despite the fact that Gregory Johnson and his attorney, James Hoffman "admitted in open court [at some unspecified time] that it would be impossible for. . . [Byrd] and his family to move themselves and their property from their home on such short notice at the same time that Ralph Byrd was required to meet his obligations to his clients." After the December 1, 2006 order, Byrd asked the Bankruptcy Court to extend the time for himself and his family to remove themselves from their property and place of business. The basis of the request was that the Maryland Court of Appeals had granted certiorari in a case in which Byrd represented defendants in a debt collection suit; his opponents in that case were represented by the firms' of Wolpoff and Abramson and

Peroutka & Peroutka and Byrd needed time to focus his energies on preparing a brief and oral argument in that case. The trustee, Gregory Johnson, and his attorneys James Hoffman and the law firm of Schulman. and Rodgers, on behalf of the other creditors, objected to any extension of time.[2]

Despite the order that Byrd and his family remove themselves and their property from their home by January 31, 2007, Byrd did not obey the order even though he exerted his "best efforts" to do so. He and his family were in the process of moving from the premises when, on February 6, 2007, James Hoffman, the attorney for the trustee, and "his agents as well as a U.S. Marshall" entered into the Byrds' home and began throwing personal property belonging to the Byrds into a dumpster. The value of the property thrown away was "more .than $25,000."

Besides the allegations already mentioned, the third amended complaint alleges that Gregory Johnson, the law firm of Schulman and Rodgers, James M. Hoffman, Esq. and Roger Schlossberg, Esq. at "all times relevant to the events recited" were "acting as the agents of Wolpoff & Abramson and Peroutka & Peroutka."

The last paragraph of the third amended complaint that deals with activities by the defendants in the Bankruptcy Court proceeding reads as follows:

> The Defendants acted not in furtherance of any goal of collecting legitimate debts but with the common purpose of inflicting devasting financial harm and deprivation upon the Plaintiff and disrupting and crippling Plaintiff's law practice in an effort to destroy

Plaintiff's ability to represent clients in credit card collection cases brought by companies owned, operated and/or represented by Wolpoff & Abramson, Harry Wolpoff, Ronald Abramson, Peroutka & Peroutka, Gary Janis, Michelle Gagnon, Scott Whiteman and Clifford Wilpon and to subject Plaintiff's law practice to catastrophic disruption just prior to oral argument in the Court of Appeals [scheduled for March 8, 2008].

II.

The Correctness, Vel non, of the Circuit Court's Dismissal of the Third Amended Complaint Insofar as the Complaint Alleges Misdeeds by the Defendants in the Bankruptcy Court Proceedings.

In the case .of Attorney Grievance Commission v. Roberts, 394 Md. 137, 160-61 (2006), the Court said:

> Abuse of process is a tort and occurs when a party had "wilfully misused criminal or civil process after it has issued an order to obtain a result not contemplated by law." Krashes v. White, 275 Md. 549, 555, 341 A.2d 798, 802 (1975) (citations omitted).
>
> The essential elements of the abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process is required; and there is not liability where the defendant has done nothing more than carry out

> the process to its authorized conclusion, even though with bad intentions.

Palmer Ford, Inc. v. Wood, 298 Md. 484, 511 , 471 A.2d 297, 311 (1984) (citation omitted). "A bad motive alone is not sufficient to establish an abuse of process." One Thousand Fleet Ltd. Partnership v. Guerriero, 346 Md. 29, 38, 694 A.2d 952, 956 (1997). In order to establish an abuse of process, there must be a definite act or threat that is not authorized by the process "or aimed at an objective not legitimate in the use of the process[.]" Id. (quoting W. Keeton, Prosser & Keeton ON THE LAW OF TORTS § 121, at 898 (5th ed.1984)).

> In Capitol Elec. Co. v. Cristaldi, 157 F. Supp. 646 (D. Md. 1958), the United States District Court for the District of Maryland stated that as abuse of process requires "a perversion of court process to accomplish some end which the process was not designed to accomplish; it does not arise from a regular use of process, even with ulterior motives." Id. at 648 (citation omitted).

Although not mentioned in Roberts, to prove legally cognizable damages in an. abuse of process case, the plaintiff must prove either "an. arrest of the person or seizure of property of the plaintiff" resulting from the abuse of process." One Thousand Fleet Ltd. P'ship, v. Guerriero, 346 Md. 29, 45 (1997).

The second element of the tort (a willful act in the use of the process not proper in the regular conduct of the proceedings) was discussed in Palmer Ford, Inc. v. Wood, 298 Md. 484, 512 (1984). The Palmer Ford Court said:

From the standpoint of the second element of the tort, it has been held to be an improper use of criminal process for the creditor, or an officer of the law acting in concert with the creditor, to demand payment of a debt as a condition of the debtor's avoiding arrest, or further confinement, or further proceedings in a criminal prosecution. See George v. Leonard, 169 F.2d 177 (4th Cir. 1948) (applying South Carolina law); Sacks v. Levy, 216 F.Supp. 44 (E.D.Pa. 1963); McGann v. Allen, 105 Conn. 177, 13.4 A. 810 (1926); McClenny v. Inverarity, 80 Kan. 569, 103 P. 82 (1909); Marlatte v. Weickgenant, 147 Mich. 266, 110 N.W. 1061 (1907); Hoppe v Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947); Kitchens v. Barlow, 250 Miss. 121, 164 So.2d 745 (1964); Ellis v. Wellons, 224 N.C. 269, 29 S.E.2d 884 (1944); Ledford v Smith, 212 N.C. 447,193 S.E. 722 (1937); Foy v. Barry, 87 A.D. 291, 84 N.Y.S. 335 (1903); and Mulliris v. Sanders, 189 Va. 624, 54 S.E.2d 116 (1949). Thus we find Prosser, supra, at 857 summarizing that "[t]here is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." 1 Harper & James, supra, at 331 states:

> If the process is employed from a bad or ulterior motive, the gist of the wrong is to be found in the uses to which the party procuring the process attempts to put it. If he is content to use the particular machinery of the law for the immediate purpose for which it was intended he is not ordinarily liable. notwithstanding a vicious or vindictive motive. But the moment he attempts to attain some collateral objective, outside the scope of the operation of the process employed, a tort has

> been consummated. The most common instance of the operation of his principle is an attempt to extort money from the person subjected to the process . . . . So also, a person using the processes of the criminal law to enforce payment of a debt is abusing legal process and is liable in damages. [Footnote omitted.]

298 Md. at 512-13 (emphasis added).

In his brief, Byrd says that the defendants initiated process against him. To support that contention, he points to the fact that the third amended complaint alleged that the trustee and the trustee's counsel acted as "the Defendants' agent." In another part of his brief, appellant says that his claim of abuse of process is limited to acts of wrongdoings by the defendants that occurred "after the issuance of process" when the defendants "misused the legal process . . . for an improper purpose," i.e., "to seize [p]laintiffs' home and place of business and [to] inflict devastating financial harm and deprivation upon [p]laintiff and to subject [P]laintiff's law practice to catastrophic disruption in an effort to destroy [p]laintiffs' ability to represent clients in credit card collection cases brought by companies owned, operated and/or represented by Wolpoff & Abramson, Harry Wolpoff, Ronald Abramson and Ronald Canter (among others)."

Assuming, as we must, that all the allegations in Byrd's third amended complaint are true, it is impossible to see how any of the defendants or their agents "misused criminal or civil process after it has issued in order to obtain a result not contemplated by law." Roberts, supra, 394 Md. at 160 (quoting Krashes v. Wright, 275 Md. 549, 555 (1975)) (emphasis added). Byrd does allege,

in paragraph 50 of his third amended complaint, that a bad ulterior motive existed on the part of the defendants but he does not allege facts sufficient to show "a perversion of court process to accomplish some end which the process was not designed to accomplish" as opposed to the "regular use of process even with ulterior motives." Capitol Elec. Co., v Cristaldi, 157 F. Supp. 646, 648 (D. Md. 1958). After all, the purpose of the order issued by the Bankruptcy Court in December 2006 was to evict appellant and his family from the premises, which is exactly what was accomplished.[3]

Aside from what has already been said, the part of the complaint that dealt with wrongs occurring in the bankruptcy proceedings were rightfully dismissed for another reason, viz: because all such claims were impliedly preempted by provisions of the Bankruptcy Code. Numerous out-of-state cases support the motions judge's decisions to dismiss on that ground.

Most, but not all, of the cases that have established the rule relied upon by the motions judge, concern state claims against creditors for either bad faith filing of involuntary bankruptcy petitions or violation of the automatic stay provision that is set forth in the Bankruptcy Code. In Glannon v. Garrett & Associates, 261 B.R. 259, 263-65 (D. Kans. 2001), the Court gave a thorough and insightful explanation of the basis for the implied preemption doctrine, viz:

> [A]n examination of the relevant case law leads the court to the conclusion that Bankruptcy Code permits no State law remedies for abuse of the bankruptcy provisions. The Bankruptcy Code provides extensive federal remedies for improper conduct in bankruptcy

proceedings. Section 303(i) authorizes sanctions for involuntary bankruptcy petitions filed in bad faith.... section 105(a) provides that the court "may issue any order, process, or judgment that is necessary or appropriate . . .to prevent an abuse of process." 11 U.S.C. § 105(a). Rule 9011 of the Federal Rules of Bankruptcy Procedure authorizes sanctions for signing certain documents not well grounded in fact and warranted by existing law or a good faith argument for extension, modification or reversal of existing law. See Fed. R. Bankr. P 9011.

***

The court finds sufficient "special features [in the Bankruptcy Code]" to justify preemption of plaintiffs state law claims. First, "Congress has expressed its intent that bankruptcy matters be handled in a federal forum by placing bankruptcy jurisdiction exclusively in the district courts as an initial matter." MSR Exploration, Ltd. v. Meridian Oil, Inc., 74 F.3d 910, 913 (9th Cir. 1996) (citing 28 U.S.C. § 1334(a)). Federal courts have exclusive jurisdiction over the filing of a bankruptcy petition, the filing of an adversary proceeding, and the imposition of an automatic stay. See Koffman [v. Osteoimplant Tech., Inc.,],182 B.R. [115] at 125 [1995]. The fact that federal courts have exclusive jurisdiction over bankruptcy matters indicates Congressional intent to preempt state remedies. "State courts are not authorized to determine whether a person's claim for relief under a federal law, in a federal court, and within that court's exclusive jurisdiction, is an appropriate one." Gonzales v. Parks, 830 F.2d 1033, 1035 (9th Cir. 1987).

Second, the comprehensive provisions of the Bankruptcy Code "demonstrates Congress's intent to create a whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike." MSR Exploration, 74 F.3d at 914. A debtor who believes a filing in bankruptcy is frivolous or a violation of the automatic stay occurred has a comprehensive scheme of remedies available in the federal courts. The existence of this comprehensive scheme precludes collateral attacks on such filings in state courts. See Gonzales, 830 F.2d at 1036. "Congress' authorization of certain sanctions for the filing of frivolous bankruptcy petitions [and violations of the automatic stay] should be read as an implicit rejection of other penalties, including the kind of substantial damage awards that might be available in state court tort suits." Id. at 1036.

Finally, "the unique, historical, and even constitutional need for uniformity in the administration of the bankruptcy laws is another indication that Congress wished to leave the regulation of the parties before the bankruptcy court in the hands of the federal courts alone." MSR Exploration, 74 F.3d at 915. The availability of sanctions in bankruptcy proceedings reflects Congress's intent that the case by case development of law relating to bad faith and willful misconduct in bankruptcy proceedings, should be accomplished in federal courts and not in state Gene R. Smith Corp. v. Terry's Tractor, Inc., 209 Cal. App. 3d 951, 954,257 Cal. Rptr. 558 (Cal. Ct. App. 1989). Reserving the question of proper filings and violations of an automatic stay to the federal courts avoids the

development of various standards in the state courts used to determine whether conduct in the bankruptcy proceeding is proper.

In addition, allowing state court remedies for wrongful filings could discourage entry into the bankruptcy system. See Gonzales, 830 F.2d at 1036 ("Even the mere possibility of being sued in state court could in some instances deter persons from exercising their rights in bankruptcy.") The potential cost of entry into the federal bankruptcy system should not be governed by state law. Gene R. Smith, 257 Cal. App. 3d at 954. "It is for Congress and the federal courts, not the state courts, to decide what incentives and penalties are appropriate for use in connection with the bankruptcy process and when those incentives or penalties shall be utilized." Gonzales, 830 F.2d at 1036.

The court finds plaintiffs state law claims based upon the filing of the involuntary bankruptcy petition, filing of the adversary proceeding, and violation of the automatic stay are impliedly preempted by the Bankruptcy Code. Most courts addressing these issues and similar issues have determined that federal law preempts state law claims.

(Emphasis added.)

Byrd points out, correctly, that several of the cases cited by appellees deal with preemption in situations where the state law claim that was preempted concerned the improper filing by a creditor of an involuntary bankruptcy petition. This distinction is valid -as far as it goes- because Byrd makes it clear in

his brief that he does not claim that the defendants acted wrongfully when they forced him into involuntary bankruptcy. But Byrd's argument goes further - at least impliedly - by contending that preemption of state law claims is limited to cases that involve bad faith filing of bankruptcy petitions. As already demonstrated by the authorities cited in Glannon, supra, the preemption doctrine is not so limited.[4]

The following cases have held that state law claims, similar to the one filed against the defendants in this case, are impliedly preempted by the Bankruptcy Code. Shiner v. Moriarty, 706 A.2d 1228,1234-3 8 (Pa. Super. Ct. 1998) (finding state law tort claims against creditors, their attorneys, and law firms for filing various improper bankruptcy papers were impliedly preempted by federal law); Edmonds v. Lawrence Nat 'l Bank and Trust Co., 823 P.2d 219 (Kan. Ct. App. 1991) (holding State court remedies were not available against a creditor based on creditor's malicious action in an attempt to revoke a debtor's discharge in bankruptcy); Gene R. Smith Corp. v. Terry's Tractor, 257 Cal. Rptr. 598 (Cal. App. 4th 1989) (debtor's cause of action for malicious prosecution of an involuntary bankruptcy proceeding and abuse of process claim impliedly preempted); Idell v. Goodman, 273 Cal. Rptr. 605, 608-10 (Cal. App. 3d, 1990) (finding state malicious prosecution action against a creditor who improperly objected to a discharge of the debt was preempted by federal law).

We find the cases just cited persuasive. If, as Byrd says in his third amended complaint, the defendants acted in bad faith and were guilty of abuse of process due to actions taken in the Bankruptcy Court, Byrd had an

opportunity to bring such complaints to the attention of the Bankruptcy Court and to secure monetary relief in that forum. To allow state law claims, such as those set forth in Byrd's complaint, to go forward would discourage creditors from exercising their rights in the Bankruptcy Court. Moreover, as the Ninth Circuit Court of Appeals said in Gonzales v Parks, 830 F.2d 1033, 1025 (9th Cir. 1987), "[s]tate courts are not authorized to determine whether a person's claim for relief under federal law, in a federal court is an appropriate one."

Byrd argues that the Bankruptcy Code provides "no remedies" for abuse of process and asserts that the defendant's reliance on section 105 (a) of 11 U.S.C.A. is misplaced. That last mentioned statute allows the Bankruptcy Court to take any action "or make any determination necessary or appropriate to enforce or implement court orders or rules or to prevent an abuse of process." According to Byrd, the Bankruptcy Court's authority "to prevent an abuse of process could not possibly preempt a party's right to seek redress in a Maryland Court for an abuse of process that only occurs after property has been seized." Therefore, his argument continues, if any agent of a defendant used the process of the Bankruptcy Court for an improper purpose, he [Byrd] would not have any right to sanctions in the Bankruptcy Court.

Byrd's argument might have merit if no Bankruptcy Rule allowed him to seek sanctions in the Bankruptcy Court after the defendants or their agents committed the tort of abuse of process. See Paul v. Monts, 906 F.2d 1468, 1475 (10th Cir. 1990) ("Where the Bankruptcy Code is silent, and no uniform bankruptcy rule is

required, the rights of the Bankruptcy Rule 9011(b) and (c), which allows a Bankruptcy Court to sanction law firms, attorneys or parties if they present to the Court any paper for any "improper purpose, such as to harass or to cause unnecessary delay or needless increase cost of ligations." Sanctions allowable for a violation of Rule 9011 include "expenses incur-red as a direct result of the violation" and attorney's fees.

We agree with the reasoning of the California Court of Appeals when it ruled that the debtor's claims for malicious prosecution and abuse of process were preempted in light of the availability of sanctions in the Bankruptcy Court. See Gene R. Smith, supra, 257 Cal. . Rptr. at 601-02. The Court said in the Gene R. Smith case:

> As noted in Gonzales v Parks (9th Cir. 1987) 830 F.2d 1023, which upheld a bankruptcy judge's order vacating a state court judgment for abuse of process obtained by a bankruptcy creditor against a debtor, "Filings of bankruptcy petitions are a matter of exclusive federal jurisdiction. State courts are not authorized to determine whether a person's claim for relief under a federal law, in a federal court, and within that court's exclusive jurisdiction, is an appropriate one .... That Congress" grant to the federal courts of exclusive jurisdiction over bankruptcy petitions precludes collateral attacks on such petitions in state courts is supported by the fact that remedies have been made available in the federal courts to creditors who believe that a filing is frivolous. Debtors filing bankruptcy petitions are subject to a requirement of good faith [citations], and violations . . . . "reflects Congress's intent that the

> case by case development of law relating to 'bad faith' in [bankruptcy proceedings] should be accomplished in federal courts and not in state courts . . . . Different standards defining identical conduct adds an unnecessary and confusing component to the uniform law to be applied in bankruptcy proceedings. The additional risk that substantial damage awards in state courts would create a material disincentive to those seeking to use the bankruptcy laws only exacerbates the problem. The determination of damages in state courts should not determine the potential cost of entry into the federal bankruptcy system."

Id. at 601-02. See also Idell v Goodman, 273 Cal. Rptr. 605 (Cal. App. 3d 1990).

For the aforegoing reason, we hold that the motions judge did not err when she dismissed appellant's abuse of process claims, insofar as those claims concerned alleged wrongs that occurred in the course of the bankruptcy proceeding.

III.

Allegations Concerning the Filing by Gary M. Janis, Esquire of a Grievance Against Byrd

As mentioned earlier, Byrd alleges in his complaint that Janis was guilty of the tort of abuse of process when he filed a grievance against him (Byrd) with the Maryland Attorney Grievance Commission. He also alleges that three other defendants (Gannon, Whitman and Wilson) committed that same tort when they supplied Janis

with "false information" that provided Janis with the grounds for the grievance he filed.

Assuming that Gannon, Whitman and Wilson gave false information to Janis, that threesome would have defamed defendant but their acts of defamation would not have made them eligible to be successfully sued for the tort of abuse of process. For starters, their false statements did not lead to Byrd's arrest or to the seizure of his property. The same is true as to Janis. At oral argument before us, Byrd, who appeared pro se, was asked how he could possibly prove that filing the grievance caused the seizure of his property or his arrest. He admitted that he could not present such evidence. Nevertheless, as to Janis, Gannon, Whitman and Wilson, Byrd claimed that they were rightfully sued for abuse of process because they, through their agents, "conspired" with those who took the (allegedly) wrongful actions in the course of the bankruptcy action.

Under Maryland law, a civil conspiracy is defined as, "a combination of two or more persons by agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, with the further requirement that the act or the means employed must result in damages to the Plaintiff." Mackey v. Compass, 391 Md. 117, 128 (2006). It is well settled that "conspiracy is not a separate tort capable of independently sustaining an award of damages." Alexander and Alexander, Inc. v. Dixon Evander and Assoc., 336 Md. 635, 645 at n.8, (1994). None of the co defendants of Janis or of Gannon, Whitman and Wilson can be successfully sued in State Court for the (alleged) wrongdoing that occurred in the bankruptcy proceeding. See Part n, supra. Therefore, Janis,

Gannon, Whitman and Wilson are not liable to Byrd for the acts of co-defendants (or their agents) based, as is here the case, solely on a conspiracy theory. We hold that under these circumstances, the motions judge had no choice but to dismiss the abuse of process claim against Janis, Gannon, Whitman and Wilson.

There is another strong reason why Byrd cannot successfully sue these four lawyers for either filing a grievance, or providing "false" information that led to the filing of a grievance, viz:

Maryland Lawyers' Rule of Professional Conduct 8.3(a), requires that a lawyer report to the Attorney Grievance Commission any violation by a fellow lawyer that raises a substantial question as to the violating lawyer's honest, trustworthiness, or fitness to practice law. Accordingly, Maryland Rule 8.3(a), has made the reporting requirement for lawyers who have knowledge of misconduct of other lawyers a mandatory and affirmative obligation. That policy is set forth in Comment 1 to Maryland Rule 8.3:

> Self-Regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Maryland Lawyers' Rule of Professional Conduct . . . An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. . .

In Kerpelman v. Bricker, 23 Md. App. 628 (1974), we held that an absolute privilege exists when a defamation action is filed against a lawyer and the acts

complained of arise from the filing with the Attorney Grievance Committee (AGC) of an ethics complaint.

Leonard Kerpelman, who was then a member of the Bar of the State of Maryland, alleged in a three-count complaint that the appellee, an attorney and a Deputy Administrator of the State Motor Vehicle Administration, falsely and maliciously charged in a letter addressed to the AGC that Kerpelman should be subject to discipline. Kerpelman, 23 Md. at 629. We held in Kerpelman 1) that a proceeding before the AGC is a judicial proceeding, id. at 630, and 2) that "it is well settled in Maryland that statements made by counsel and by parties in the course of "judicial proceedings" are privileged so long as such statements are material and pertinent to the questions involved, irrespective of the motive with which they are made." Id. at 629 (citing DiBlasio v. Kolodner, 23 Md. 512 (1964); Kennedy v. Cannon, 229 Md. 92 (1962); Maulsby v. Reifsnider, 69 Md. 143 (1888)). The Kerpelman Court further noted that this privilege was absolute and applied irrespective of the motive of the complainant. 23 Md. App. at 629.

In recognizing the strong public policy reason associated with having attorneys self-regulate, we rejected Kerpelman's contention that only a qualified privilege should apply to an AGC complaint, viz:

> It is better therefore to make the rule of law so large that counsel acting bona fide in the discharge of duty, shall never be troubled, although by making it so large, others who have acted. mala fide and maliciously, are included. The question whether words spoken by counsel were spoken maliciously or

> in good faith, are, and always will be, open questions, upon which opinion may differ, and counsel, however innocent, would be liable if not to judgments, to a vexatious and expensive litigation. The privilege thus recognized by law is not the privilege merely of counsel, but the privilege of clients, and the evil, if any, resulting from it must be endured for the sake of the greater good which is thereby secured.

Id. at 633 (quoting Maulsby v. Reifsnider, 69 Md. 143, 152-53 (1888)).

The same public policy reasons that prevented the lawyer (who reported Kerpelman to the AGC) from being sued for defamation based upon what he said in a proceeding before the AGC applies with equal force to what defendants are alleged to have done in this case, i.e., 1) file a grievance against, Byrd or 2) provide "false" information to Jams to be used by him in the AGC proceeding.[5]

Byrd argues that while the communications with the AGC are privileged, abuse of process claims should not be. Byrd relies on the following quote from Orfanos v. Athenian, 66 Md. App. 507, 522 (1986).

> [T]he law does not view with favor the improper use of judicial process. It also provides a basis for not applying the privilege, or immunity, that attends in defamation cases. Although a suitor is privileged with respect to defamatory statements contained in pleadings, he is not similarly privileged to abuse or maliciously use civil process. Keys v. Chrysler Credit Corp., 303 Md. 397,494 A.2d 200 (1985).

This argument does not merit extensive comment in light of the fact, discussed supra, that Janis, Gannon, Whitman and Wilson indisputably did not commit the tort of abuse of process because their actions, viewed either individually or collectively, did not result in the seizure of appellant or his property.

IV.

Claim Against Dennis Biennas And Assistant Bar Counsel Fletcher Thompson

Fletcher Thompson was alleged to have committed only one "wrongful" act, i.e., he issued, on behalf of the AGC, an investigative subpoena to Byrd requiring Byrd to produce, within three days, his files in seventeen credit card collection cases. Dennis Biennas is also alleged to have committed only one wrongful act, viz: he served the aforementioned subpoena on Byrd. Byrd did not allege in his complaint that he obeyed the subpoena. To the contrary, he alleged that Thompson and Biennas served the subpoena. "with no expectation" that Byrd would be able to comply with it. Appellant did allege that the intent of Thompson and Biennas was to distract him ". . .from the oral argument in Howard County Circuit Court [in a case that was to commence] within minutes after Dennis Biennas served Ralph Byrd with the subpoena and to distract Ralph Byrd from the oral argument that was to take place [two days later] in Sheri Jackson v. Pasadena Receivables wherein Harry Wolpoff and Ronald Canter noticed their appearances in [the] Maryland Court of Appeals on behalf of Pasadena Receivables, Inc. along with Michelle Gagnon of Peroutka & Peroutka." Byrd did not allege that the actions of the assistant bar counsel or

the process server did, in fact, distract him, nor did he allege that the defendants' actions affected the outcome of either the Howard County case or the case he was to argue in the Court of Appeals.

In his brief, appellant asserts that he did allege a cause of action for abuse of process against Thompson and Biennas. As to the "arrest or seizure of Property" element of that tort, appellant argues:

> The Third Amended Complaint makes very serious charges against Fletcher Thompson. It alleges that Fletcher Thompson's actions were part of the overall effort by all the Defendants named in the Third Amended Complaint to drive Plaintiff out of business. The seizure of Plaintiffs home and place of business was one of the successes of that over all effort. Defendant Thompson used what might otherwise have been legitimate process to pursue a goal not contemplated under the law for such process in an effort to harm Plaintiffs ability to represent clients in credit card collection cases brought by companies owned, operated and/or represented by Wolpoff & Abramson, Harry Wolpoff, Ronald Abramson, Ronald Canter, Gary Janis, Michele Gagnon, Scott Whiteman and Clifford Wilpon. The goal was partially accomplished by the seizure of Plaintiff's home and place of business. Fletcher Thompson knowingly and willfully furthered that goal when he misused a subpoena to obtain an advantage for the other Defendants in ongoing state court litigation. The Defendants are still pursuing the goal of disbarring Plaintiff from practicing law in the State of Maryland despite the fact that, as alleged in paragraph 61 of the

> Third Amended Complaint, the Peer Review recommended that the charges be dismissed.

The above argument is absurd. Byrd's home and office were seized by a U.S. Marshall on February 6, 2007, exactly one month before the subpoena for Byrd's records was served by Biennas. Thus, the service of the subpoena could not possibly have had any role in the seizure of appellant's property. Therefore, the third amended complaint did not state a valid cause of action for abuse of process against either Thompson or Biennas. All the defendants named in the third amended complaint (including Thompson and Biennas) were sued for "conspiracy" but, as already demonstrated, that is not a stand-alone tort capable of sustaining an award of damages. Alexander & Alexander, 336 Md. at 645, n.8. Because Byrd's third amended complaint did not state a cause of action for abuse of process against any defendant, his "conspiracy" count was not viable and therefore both counts were properly dismissed with prejudice.

JUDGMENT AFFIRMED;
COSTS TO BE PAID BY APPELLANT.

Footnotes

1 The Bankruptcy Court, in a memorandum opinion dated August 27, 2008, ruled that Byrd and his wife were to blame for the extraordinarily high administrative fees. The Court said:

> The trustee testified that the total administration claims in the case now approach $300,000, which the Trustee testified is extraordinarily high for what

should have been a straightforward bankruptcy case with a relatively small number of assets and claims against the estate. The Trustee testified that this amount is directly attributable to the Debtors' conduct in this case.

The Trustee's testimony was uncontroverted and collaborated by the record in this case. The Court has witnessed the Debtors' conduct during the past eighteen months and has reviewed the docket for the period prior to that time. The Court accepts the Trustee's testimony in its findings and conclusions and finds that the Debtors have abused the bankruptcy process and are acting in bad faith.

2 According to the Bankruptcy Court docket entries, of which we take judicial notice, the Court denied Byrd's request for additional time to remove himself and his personal property from 4901 Sundown Road, Laytonsville, Maryland, on December 28, 2006.

3 When the attorney for the trustee and the Federal Marshall evicted appellant in February 2007, appellant's house had already been sold by the trustee pursuant to an order by the Bankruptcy Court. The docket entries of the Bankruptcy Court show that the sale was made in May of 2006. Appellant failed to obey the court's order to remove himself and his possessions from the house by January 31, 2007. Therefore, the obvious reason why the property was seized in February 2007, was so that the person who purchased the property could take possession of it.

4 Appellant relies on Paradise Hotel v. Bank of Nova Scotia, 842 F.2d 47 (3rd Cir. 1988). Appellant argues that the Paradise Hotel case was one:

> brought by a plaintiff/debtor who was the victim of an involuntary bankruptcy proceeding brought under Chapter 7 of the Bankruptcy Code. Rather than litigate the propriety of the involuntary Chapter 7 liquidation proceeding, and seek dismissal and damages under § 303(i)(2) of the Code, Paradise Hotel Corp. converted the involuntary Chapter 7 proceeding to a voluntary Chapter 11 reorganization proceeding which lasted for two years. Upon the completion of the Chapter 11 proceeding Paradise Hotel Corp. sued for malicious prosecution, abuse of process, false representation and intentional interference with business relationships, among other claims, based upon the filing of the involuntary petition. Id. at 48-49. In response, the defendants sought to dismiss the state law claims, arguing, inter alia, that the remedy provided by § 303(i)(2) of the Code against petitioners who have filed in bad faith is an exclusive one. The 3rd Circuit Court of Appeals disagreed stating:
>
> > We agree that this section was intended to permit a bankruptcy court to adjudicate claims in a Chapter 7 proceeding like those of Paradise. It does not require that all such claims be so adjudicated, however, and we know of no case which so holds. Moreover, we believe it would be inconsistent with the overall scheme of the Code to find that § 303(i)(2) is an exclusive remedy for such claims.

> Under § 706 of the Code of debtor, with exceptions not here relevant, is entitled as of right to convert a Chapter 7 proceeding to a Chapter 11 proceeding at any time. Frequently, it is in the debtor's best interest to convert without delay and commence its reorganization as promptly as possible. If we were to accept the Bank's arguments regarding the exclusivity of §303(1)(2), we would place a debtor in this situation on the horns of a dilemma by requiring it to choose between two unattractive alternatives. One alternative would be to pay the price of indefinitely postponing the conversion in order to litigate the legal sufficiency of the petition, the bad faith of the petition, and the amount of its damages in the Chapter 7 case. The other alternative would be to convert immediately in order to secure the Chapter 11 advantages the debtor was intended to have but thereby release its claims against the petitioner who allegedly petitioned in bad faith. We think Congress did not intend that a debtor should have to pay this kind of penalty for exercising its statutory right to convert promptly. Accordingly, we decline to hold that § 303(1)(2) is an exclusive remedy in a situation of this kind.
>
> For these reasons, we cannot agree that Paradise's response to the Chapter 7 petition forecloses its claims in this action.

Id. at 52.

Paradise Hotel is not factually similar to this case. Its holding was limited to situations in which a debtor lost the remedy provided under section 303(i) by converting a Chapter 7 bankruptcy to a Chapter 11 bankruptcy.

Here, appellant did not lose the remedy under 303(i), because that remedy is reserved exclusively for wrongful filings of involuntary bankruptcy petitions. Byrd also relies on U.S. Express Lines, Ltd. v. Higgins, 281 F.3d 383 (3 rd. Cir. 2002). Although U. S. Express quoted liberally from the Paradise Hotel case, U. S. Express did not concern a claim of alleged misconduct in a bankruptcy case or disobedience of the bankruptcy Rules, but, addressed instead the question of whether the Federal Rules of Civil Procedure pre-empt state law claims for abuse of process.

5 See Attorney Grievance Commission v Ralph T. Byrd, 408 Md. 449 (2009). As part of the opinion in which the court concluded that Byrd's conduct warranted disbarment, the Court discusses the grievance filed by Janis against Byrd. Id. at 472-76. The bottom line is that the Court of Appeals found by clear and convincing evidence that all of Janis's complaints against Byrd were meritorious. Id. at 482. Byrd filed exceptions to many of the circuit court's findings in regard to Janis's grievances but the Court of Appeals overruled all of his exceptions. Id. at 472-82.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND
Civil No. 281858

RALPH T. BYRD, et al., Plaintiffs,

V.

WOLPOFF AND ABRAMSON, LLP, et al.,
Defendants.

Rockville, Maryland May 20, 2008

WHEREUPON, the proceedings in the above-entitled matter commenced

BEFORE: THE HONORABLE LOUISE G. SCRIVENER, JUDGE APPEARANCES:

FOR THE PLAINTIFFS:
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APPEARANCES (continued)
FOR THE DEFENDANT FLETCHER THOMPSON:

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FOR THE DEFENDANTS WOLPOFF AND ABRAMSON, LLP; RON ABRAMSON; HARRY WOLPOFF; RON CANTER; PEROUTKA AND PEROUTKA, P.A.; GARY JANIS; MICHELLE GAGNON; SCOTT WHITEMAN; AND CLIFF WILPON: SHIRLIE N. LAKE, Esq.

NATHANIEL K. RISCH, Esq.
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***

THE COURT: All right, the Court is going to grant each of the motions to dismiss in this case with prejudice. But since the reasons differ as to the various defendants, I'm going to just briefly go through my reasons for granting the motion.

I need to start by saying that in general, having read the third amended complaint, and it occurs to me as argument was going forward this morning, that the case is improperly pled from the get go since there are only two counts alleged which actually have different theories of liability as to multiple defendants. It is not clear from the pleadings themselves what the cause of action is pled as to each of those defendants, nor what compensatory damages are claimed as to which defendants and under which theories.

But if that were the only basis -- since that hasn't even been argued, I'm just making a general observation -- but if that were the basis for my ruling, then I would need to provide leave to amend; it wouldn't be a dismissal with prejudice. But that hasn't even been argued nor is it the basis for my ruling, it's just a general comment, that by the fourth time you file a complaint, you need to get these things right and it's

clearly improperly pled. But that's not the basis for my ruling.

With respect to what I'm going to call the Wolpoff defendants, which includes Wolpoff and Abramson, Harry Wolpoff, esquire, Ronald Abramson, esquire, Ronald Canter, esquire -the dismissal is based on preemption. I do find that the Kaufman case is determinative, that it applies to this case and I disagree that it is limited in its preemption only to the actual filing and not to actions that occur after that initial filing. And I think the language in the case makes it clear.

It specifically goes through a number of different remedies provided by statute, the bankruptcy statute. One of them does have to do with initial filing but it also goes through a number of other remedies and where those remedies are provided for in the bankruptcy statute, a separate state court action is then precluded or preempted. And I find that that preemption applies in this case to the allegations made.

With respect to the Peroutka defendants, I read the complaint as complaining about the actions of the Peroutka defendants, as I'm calling them, and I guesss I should name those for the record -- that includes Peroutka and Peroutka,

Gary Janis, esquire, Michelle Gagnon, esquire, Scott Whiteman, esquire, and Clifford Wilpon, esquire -

I read the complaint as complaining about their actions in connection with the Attorney Grievance Commission.

You then said in argument that actually, no, it also has to do with the bankruptcy because they were involved, either representing or one of the creditors in that case, which is why I noted that the complaint is improperly pled because I didn't even know that you

were alleging that against the Peroutka defendants. But in any event, to the extent you were, then preemption would also apply there.

But, I believe that there is an absolute privilege against suing when an attorney files a grievance or provides information in connection with a grievance relying on the Karpulman case, and that to the extent these actions against the Peroutka defendants do go to what was happening in connection with that attorney grievance filing, then I am dismissing it based on that privilege.

As to bar counsel, which would include Fletcher Thompson and, to an extent, Dennis Biennas, although he hasn't been served and therefore hasn't actually been heard, if you will, but the theory is the same and I'm granting it as to him as well -- I believe that there is immunity. The specific conduct complained of, as I read the complaint, was the subpoena that was served in the course of investigating this complaint, the grievance that was filed. But, to the extent you're also complaining about any other actions taken in the course of investigating or deciding how and whether to prosecute, I believe that privilege does apply.

Clearly these things are done in connection with their duties, as to both investigation and prosecution, and that actions taken in connection with those duties are privileged. I don't think you have a basis to file suit against them for abuse of process or still, a conspiracy. So, I am granting the motion to dismiss for the reasons stated on the record as to each of the defendants and that dismissal is with prejudice.

MS. LAKE: Thank you, Your Honor.

MR. BYRD: Thank you, Your Honor.

MS. AUSBY: Thank you, Your Honor. (The proceedings were concluded.)

Filed: 06/23/2004
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Case No. 01-2-5006 –DK (Chapter 7)
Civil Action No. WMN-02-2675

In re: Ralph Byrd

Ralph T. Byrd

v.

Platinum Financial Services Corporation

ORDER

For the reasons stated in the foregoing memorandum, IT IS this 15th day of June, 2004, by the United States District Court for the District of Maryland, ORDERED:

1. That Ralph Byrd's Motion for Reconsideration of Remand Order, Paper No. 32, is DENIED; and

2. That the Clerk of the Court shall mail copies of this Memorandum and Order to Appellant and all counsel of record.

William M. Nickerson
Senior United States District Judge

Filed: 06/23/2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Case No. 01-2-5006 –DK (Chapter 7)
Civil Action No. WMN-02-2675

In re: Ralph Byrd

Ralph T. Byrd

v.

Platinum Financial Services Corporation

MEMORANDUM

Before the Court is Ralph Byrd's Motion for Reconsideration of Remand Order, Paper No. 32. The motion is fully briefed, Upon a review of the motion and the applicable case law, the Court determines that no hearing is necessary and that the motion will be denied.

The procedural history of this litigation, briefly summarized, is as follows. Platinum Financial Services Corporation (Platinum) initiated an involuntary bankruptcy proceeding against Debtor Ralph Byrd to enforce several state court judgments it held against Byrd. Byrd challenged Platinum's filing of the involuntary petition on the grounds that: Platinum's state court judgments remained the subject of bona fide disputes; (2) Platinum filed the petition in bad faith, as an improper means of debt collection and to delay the immminent trial of a state court action brought by Platinum against Byrd and for which Byrd asserts Platinum was unprepared; and (3) the Bankruptcy

Court should abstain from accepting jurisdiction under 11 U.S.C. Sec. 305. The parties filed cross motions for summary judgment.

After a hearing, Judge Duncan Keir of the Bankruptcy Court found that, under the undisputed facts, Platinum was entitled to judgment as to each of these issues. As to the first issue, the Bankruptcy Court held that where, as here, a claim has been reduced to a state court judgment which is unstayed, the party against whom the judgment is entered is precluded from asserting that there is a bona fide dispute as to the liability embodied in that judgment. Tr. of July 17, 2002 Ruling at 9.[1] As to the second issue, Judge Keir found that Platinum's petition was not filed in bad faith, based upon the uncontested fact that Byrd was unable, or at least unwilling, to pay his debts as they became due, coupled with his concern about the potential dissipation of Byrd's assets. On the issue of the potential dissipation of assets, Judge Keir noted that a mortgage foreclosure sale of Byrd's residence had been commenced, and he took judicial notice that a forced sale at auction will often yield less than the fair market value of the property. Id. at 13-14.[2] The Bankruptcy Court also observed that the filing of a bankruptcy petition, whether filed voluntarily or involuntarily, often has an impact on other litigation, and the fact of that impact alone is not a sufficient basis for dismissal. Id. at 14. Judge Keir also intimated that the bankruptcy stay could be lifted to allow some of the state court litigation to go forward in that venue. Id. at 15. He further observed that, regardless of the strength or weakness of Platinum's evidence in the particular soon-to-be tried state court action, other claims of Platinum, already reduced to judgments, were more than

sufficient in the aggregate to meet the requirements for an involuntary petition, Id.

As to Byrd's argument for abstention, Judge Keir found no basis for completely abstaining from asserting jurisdiction over the matter under Section 305. He again, however, suggested the possibility of lifting the bankruptcy stay to allow specific claims to go forward in the appropriate state courts. Id. at 17. Byrd appealed the Bankruptcy Court's decision to this Court. Influenced by a decision of the Maryland Court of Special Appeals that agreed, at least in part, with Byrd's legal argument challenging the validity of the debts Byrd owed to Platinum, as well as comments of a Maryland Circuit Court judge that Byrd's legal argument "really raised a question in his mind," this Court head that Platinum's claims were subject to bona fide disputes. This Court also followed a line of cases holding that the most important factor in determining whether a bona fide dispute exists is whether the decision reducing the claim to judgment is to be given preclusive effect under the laws of the forum rendering that judgment.

For those reasons, this Court reversed the Bankruptcy Court and found that the involuntary petition should be dismissed. Because this Court's conclusion regarding the presence of a bona fide dispute was dispositive of the appeal, this Court did not reach Byrd's alternative arguments involving bad faith or abstention. Platinum appealed this Court's decision to the Fourth Circuit Court of Appeals.

On February 11, 2004, the Fourth Circuit issued a ruling reversing this Court's decision. In re Byrd, 357

F.3d 433 (4th Cir. 2004). While finding that the Bankruptcy Court's conclusion that any claim that has been reduced to an unstayed judgment can never be the subject of a bona fide dispute was an overly broad principle, the Fourth Circuit took issue with this Court's consideration of the preclusive effect of the state court judgments. The Fourth Circuit concluded:

> The Bankruptcy Code does not require that a debtor's assets be dissipated while frivolous or hopeless appeals wend their way through the courts, but neither does it permit debt collection by every creditor that reduced its claims to judgment. Platinum was eligible to file an involuntary petition against Byrd not simply because Platinum had reduced its claims to judgment, but because Byrd failed to raise any substantial factual legal questions about the continued viability of those judgments. We therefore reverse the judgment of the district court and remand for further proceedings consistent with this decision.

357 F.3d at 441. In a footnote appended to that last quoted sentence, the Fourth Circuit also instructed,

> Platinum's involuntary petition listed all six of its claims against Byrd. However, Platinum's motion for summary judgment addressed only the three of its six claims already reduced to judgment, and the bankruptcy court likewise addressed only those three claims in granting Platinum's motion. On remand, the bankruptcy court will have to determine whether relief on the three claims not reduced to judgment is also appropriate under 11 U.S.C. § 303(h)(1).

Id. at 441 n.4.
In his briefing before the Fourth Circuit, Byrd included extensive argument on bad faith and abstention as alternative grounds for affirming this Court's decision. The Fourth Circuit, however, made no explicit mention of either of these issues in its decision.

On the day after the Fourth Circuit issued its mandate, this Court issued an order remanding the case to the Bankruptcy Court for further proceedings consistent with the opinion of the Fourth Circuit. Byrd filed his motion to reconsider that order of remand, arguing that this Court must first address the outstanding issues of bad faith and abstention. In addition to reasserting his arguments on those issues previously made in, the Bankruptcy Court, in this Court, and before the Fourth Circuit, Byrd also urges this Court to consider actions taken by Platinum in one of the state court actions between Byrd and Platinum since the Fourth Circuit issued its opinion. Specifically, Byrd points the Court's attention to Platinum's motion to substitute the bankruptcy trustee for Byrd as the "real party in interest" in a class action that Byrd had filed, pre-petition, against Platinum.[8] Byrd cites the filing of this motion as "further proof that Platinum's motive for filing the involuntary bankruptcy petition was to attempt to gain control of the pre- petition state court class action litigation Byrd had brought against Platinum, et al." Mot. to Reconsider at 8.

Given the rationale and tenor of the Fourth Circuit's decision, this Court is doubtful that it has the authority to consider these issues. The Fourth Circuit recently reiterated the permissible scope of the issues that a district court can consider upon remand.

> Few legal precepts are as firmly established as the doctrine that the mandate of a higher court is controlling as to matters within its compass. Under the mandate rule, a lower court generally may not consider questions that the mandate has laid to rest. . . . A district court must except in rare circumstances, implement both the letter and the spirit of the mandate, taking into account the [appellate court's] opinion and the circumstances it embraces. . . . [T]he mandate rule forecloses relitigation of issues expressly or,implied decided by the appellate court. The mandate rule does not simply preclude a district court from doing what an appellate court has expressly forbidden it from doing. Under the mandate rule, a district court cannot reconsider issues the parties failed to raise on appeal; the court must attempt to implement the spirit of the mandate; and the court may not alter rulings impliedly made by the appellate court.

South Atlantic Limited Partnership v. Riese, 356 F.3d 576 (4th Cir. 2004) (internal quotation and citations omitted, emphasis added).

As Byrd himself notes, the issue of bad faith was unquestionably presented to the Fourth Circuit and was readily available as an alternative ground for affirming the decision of this Court, had the Fourth circuit desired to do so. While it would have been helpful, had that court addressed the issue directly, it is clear from the spirit of the opinion that Byrd's bad faith argument was considered and rejected . As summarized above, the gravamen of Byrd's bad faith argument was that there was no evidence presented to support the

pre-petition dissipation of Byrd's assets, and that Platinum filed the action as an impermissible means of debt collection. In the final paragraph of its opinion, quoted above, the Fourth Circuit alludes to both the dissipation of assets and debt collection, but then goes on to endorse Platinum's filing of an involuntary petition against Byrd. Additionally, the language of the footnote appended to the final sentence of the opinion clearly anticipates that this court would, upon remand, simply further remand the case to the Bankruptcy Court for a determination as to whether Platinum was also entitled to relief on the three claims not reduced to judgment.

There is a limited exception to the mandate rule allowing the court to which a case has been remanded "to reopen an issue expressly or impliedly decided by the appellate court where ... significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light." South Atlantic Limited, 356 F.3d at 331 n.9 (emphasis added). Byrd's evidence regarding Platinum's recent filing of a motion to substitute is not "significant new evidence." Byrd presented very similar evidence to the Fourth Circuit, and made the same argument that he now makes, when he represented to that court that the trustee was seeking authorization for the appointment of special counsel to represent the trustee as "the party in interest' in substantial litigation pending against Platinum." Byrd's Appellant Brief at 30.

Byrd's abstention argument presents a slightly different situation, in that the decision to abstain or not to abstain under, 11 U.S.C. § 305 is not reviewable by a court of appeals. 11 U.S.C. § 305(c); In re Goerg, 930 F.

2d 1563. Nonetheless, Byrd fully briefed the issue before the Fourth Circuit and the Fourth Circuit could have instructed this court, upon remand, to consider whether abstention provided an alternative ground to dismiss the petition. The Fourth circuit's opinion, however, was silent as to this issue.

Assuming that this court has the authority to now review the issue of abstention, it would not reach a decision contrary to that of the Bankruptcy Court. Determinations of law made by the bankruptcy court are reviewed de novo, while factual findings are reviewed under a clearly erroneous standard. In re Door , 930 F. 2d at 1566. The drafters of the current language of § 305, however, "recognized that in most cases the decision to abstain from a bankruptcy case turns on considerations unique to bankruptcy law and thus is especially suited for the expertise of the bankruptcy court., Id. at 1567 (citing Report of the Federal Courts Study, Committee, part II, p. 77, part III, pp. 371-374).

Here, the bankruptcy judge appropriately exercised that expertise. Finding the potential for dissipation of Byrd's assets,[5] Judge Keir concluded that the best means by which to protect the rights of Byrd's creditors was through bankruptcy. Judge Keir, however also reserved his liberty to exercise selective abstention under section 1334, to enable him to address those concerns raised by Byrd as to the management of pending state litigation. This Court finds no error in those decisions,fn6 Byrd's Motion for Reconsideration will be denied. A separate order consistent with this memorandum will issue.

William M. Nickerson
Senior United States District Judge
Dated: June 15, 2004

Footnotes:

1 An excerpt of the transcript of this hearing containing the Bankruptcy Court's decision was appended to Platinum's Appellee brief at Apx. 13-18.

2 Byrd argued before the bankruptcy court, and at each subsequent stage in these proceedings, that the foreclosure had been stopped by his own payment arrangements prior to Platinum's filing of the bankruptcy petition.

3 Byrd is an attorney, and filed this class action on behalf of himself, his wife, and the class of similarly situated individuals whom had opened credit cards with Platinum after a specified date.

4 In light of the Fourth Circuit's concern that Platinum's claims should not be delayed while appeals "wend their way through the courts," it appears clear that the Fourth Circuit intended that this Court avoid taking up these additional issues upon remand, given that any decision of this Court on those issues would undoubtedly generate a new appeal.

5 As noted above, Judge Keir's concern about dissipation was related to a then-recent foreclosure action that had been commenced upon Byrd's residence. Byrd acknowledges that his inability to pay his debts on time "resulted in the commencement of foreclosure proceedings on his home on occasion." Byrd Aff. at Par.

5 (App. 6). Although Byrd also avers that, on each occasion that foreclosure was commenced, he was able to cure the default and stave off the foreclosure sale, this Court cannot conclude that Judge Keir's concerns were unwarranted. Byrd's own affidavit paints a picture of continued uncertainty as to whether his home would be sold at auction. As noted above, the Fourth circuit, upon consideration of the same record now before this Court, appears to have concurred that the Debtor's assets were in danger of being dissipated. 357 F. 2d at 441.

6 To the extent that the filing of the motion to substitute the bankruptcy trustee for Byrd in the state court class action is "new evidence" that could alter the resolution of the abstention issues, that is a finding that must be made, in the first instance, by the bankruptcy court. See Goerg, 930 F. 2d at 1566 (observing that the district court is not authorized to make independent factual findings regarding abstention).